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In The

Supreme Court of the United States

October Term, 1996

AMERICAN PUBLIC GAS ASSOCIATION and
CITIZENS GAS & COKE UTILITY,

Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit erred in holding that the Federal Energy Regulatory Commission acted within its jurisdictional mandate in extending the provisions of its natural gas capacity release program (promulgated under the Natural Gas Act, 15 U.S.C. § 717 *et seq.*) to municipalities which are exempt from FERC regulation under the plain meaning of the Natural Gas Act.

PARTIES TO THE PROCEEDING

Pursuant to Rules 14.1(b) and 29.6 of the Rules of the Supreme Court of the United States, Petitioners state as follows:

American Public Gas Association

The American Public Gas Association ("APGA") is a national not-for-profit association of over 460 municipal and other publicly-owned local distribution systems in thirty six states that provide natural gas distribution service to the communities in which they are located. APGA was founded in 1961 for the purposes, among others, of enhancing the safety, reliability, service and competitiveness of publicly-owned gas distribution systems and to participate in state and federal policymaking decisions that affect the operations of public gas systems.

All of APGA's full members are political subdivisions of states, *e.g.*, municipalities, utility boards, and utility districts. APGA also allows businesses serving the natural gas distribution industry to join as "associate members."

Citizens Gas & Coke Utility

Citizens Gas & Coke Utility ("Citizens"), the City of Indianapolis' municipal gas distributor, provides natural gas for public consumption to approximately 250,000 customers in Indianapolis and Marion County, Indiana.

In addition to the above Petitioners, the following were parties to the proceeding before the court of appeals:

Federal Energy Regulatory Commission (Respondent)

Alabama Gas Corporation (Intervenor)

Algonquin Gas Transmission Company (Intervenor)

Allied Signal Inc. (Intervenor)

American Forest & Paper Association (Petitioner)

American Public Gas Association (Petitioner)

Amoco Production Company (Intervenor)

Anadarko Petroleum Corporation (Intervenor)

ANR Pipeline Company (Intervenor)

Arcadian Fertilizer (Petitioner)

Arco Natural Gas Marketing (Intervenor)

Arco Oil & Gas Company (Intervenor)

Arizona Electric Power Cooperative Inc. (Petitioner)

Arizona Public Service Company, *et al.* (Petitioner)

Asarco, Inc., Cyprus Miami Mining Corporation, and Magma Copper Company (Petitioner)

Associated Gas Distributors (Petitioner)

Associated Natural Gas Company (Petitioner)

Atlanta Gas Light Company (Petitioner)

Baltimore Gas & Electric Company (Petitioner)

Bay State Gas Company, *et al.* (Intervenor)

Board of Water, Gas & Light Commissioners, Albany, Georgia (Intervenor)

Brooklyn Union Gas Company (Intervenor)

Canadian Association of Petroleum Producers, *et al.* (Intervenor)

Carnegie Natural Gas Company (Petitioner)

Chattanooga Gas Company (Petitioner)

Cascade Natural Gas Corporation (Intervenor)

Chevron, U.S.A., Inc. (Intervenor)

Cincinnati Gas & Electric Company, *et al.* (Intervenor)

Citizens Gas & Coke Utility (Petitioner)

City of Hamilton, Ohio (Petitioner)

CNG Transmission Corporation (Petitioner)

Colorado Interstate Gas Company (Petitioner)

Colorado Springs Utilities (Petitioner)

Columbia Gas Distribution Companies (Intervenor)

Columbia Gas Transmission Corporation (Intervenor)

Conoco, Inc. (Intervenor)

Consolidated Edison Company of New York, Inc. (Petitioner)

Dakota Gasification Company (Intervenor)

Dayton Power & Light Company (Intervenor)

Destec Energy, Inc. (Intervenor)

East Ohio Gas Company, *et al.* (Intervenor)

East Tennessee Group (Petitioner)

East Tennessee Natural Gas Company (Intervenor)

Elizabethtown Gas Company, an Operating Division of NUI Corporation (Petitioner)

El Paso Natural Gas Company (Intervenor)

Enron Oil & Gas Marketing, Inc. (Intervenor)

Enserch Development Corporation (Petitioner)

Equitrans, Inc. (Petitioner)

Exxon Corporation (Intervenor)

Florida Cities (Intervenor)

Florida Gas Transmission Co. (Intervenor)

Foothills Pipelines Ltd. (Intervenor)

Fort Pierce Utilities Authority and the City of Vero Beach, Florida (Intervenor)

Fuel Managers Association (Intervenor)

Georgia Industrial Group (Petitioner)

Great Lakes Gas Transmission Ltd. (Intervenor)

Hadson Gas Systems, Inc. (Petitioner)

Illinois Commerce Commission (Petitioner)

Illinois Power Company (Petitioner)

Indiana Gas Company (Petitioner)

Interstate Natural Gas Association of America (Intervenor)

Joint State Commissions and Consumer Advocates (Petitioner)

KN Energy, Inc. (Intervenor)

Kern River Gas Transmission Company (Petitioner)

Koch Gateway Pipeline Company (Petitioner)

Laclede Gas Company (Petitioner)

Long Island Lighting Company (Petitioner)

Louisville Gas & Electric Company (Petitioner)

Maryland Office of People's Counsel (Petitioner)

Maxus Exploration Company and Maxus Gas Marketing Company (Intervenor)

Memphis Light, Gas and Water Division (Petitioner)

Meridian Oil Inc. (Petitioner)

Michigan Consolidated Gas Company (Intervenor)

Midland Cogeneration Venture Limited (Petitioner)

Minnesota Public Utility Commission and Minnesota Department of Public Service (Intervenor)

Mississippi River Transmission Corporation (Intervenor)

Missouri and Kansas Gas Users (Intervenor)

Missouri Public Service Commission, *et al.* (Petitioner)

Mitchell Energy Corporation (Intervenor)

Mobile Gas Service Corporation, *et al.* (Intervenor)

Mobil Natural Gas, Inc. (Intervenor)

Montana Public Service Commission, Public Utilities Commission of South Dakota and Montana Consumer Counsel (Petitioner)

Mountaineer Gas Company (Petitioner)

National Association of State Utility Consumer Advocates (Petitioner)

National Association of Gas Consumers (Intervenor)

National Fuel Gas Supply Corporation (Intervenor)

Natural Gas Clearinghouse (Intervenor)

Natural Gas Pipeline Company of America (Intervenor)

New Jersey Board of Regulatory Commissioners (Petitioner)

New Jersey Natural Gas Company (Petitioner)

New York State Electric & Gas Corporation (Intervenor)

New England Power Company (Petitioner)

Northern Indiana Public Service Company (Petitioner)

Niagara Mohawk Power Corporation (Petitioner)

NorAm Energy Corporation (Petitioner)

North Carolina Natural Gas Company and Public Service Commission of North Carolina (Intervenor)

Northeast Energy Associates and New Jersey Energy Associates (Intervenor)

Northern Border Pipeline Company (Intervenor)

Northern Distributor Group (Intervenor)

Northern States Power Company (Minn.), *et al.* (Intervenor)

Northern Natural Gas Company, *et al* (Intervenor)

Northwest Alaskan Pipeline Company (Petitioner)

Ocean State Power, *et al.* (Petitioner)

Office of the Consumers' Counsel, State of Ohio (Petitioner)

Orange and Rockland Utilities, Inc. (Petitioner)

Ozark Gas Transmission System (Petitioner)

Pacific Gas & Electric Company (Petitioner)

Pacific Interstate Transmission Company, *et al.* (Intervenor)

Pan-Alberta Gas, Ltd. (Intervenor)

Panhandle Customer Group (Intervenor)

Panhandle Eastern Pipe Line Company (Intervenor)

Panhandle Trading Company (Intervenor)

Pennzoil Exploration & Production Company and Pennzoil Gas Marketing Company (Intervenor)

PEPCO Energy (Petitioner)

Pennsylvania Office of Consumer Advocate (Petitioner)

Pennsylvania Public Utility Commission, *et al.* (Petitioner)

Peoples Gas System, Inc. (Intervenor)

Peoples Natural Gas Company (Petitioner)

Piedmont Natural Gas Company (Petitioner)

Philadelphia Electric Company (Petitioner)

Phillips Petroleum Company, *et al.* (Intervenor)

Plains Petroleum Operating Company (Petitioner)

Process Gas Consumers Group, *et al.* (Intervenor)

Producer-Marketing Transportation Group (Petitioner)

ProGas, Ltd. (Petitioner)

Public Service Commission of the Commonwealth of Kentucky (Petitioner)

Public Service Commission of Nevada (Intervenor)

Public Service Commission of the State of New York (Petitioner)

Public Service Commission of West Virginia, Consumer Advocate Division (Petitioner)

Public Service Commission of Wisconsin (Petitioner)

Public Service Electric & Gas Company (Intervenor)

Public Utilities Commission of the State of California (Petitioner)

Rochester Gas & Electric Company (Intervenor)

Shell Gas Trading Company (Intervenor)

South Jersey Gas Company (Intervenor)

South Carolina Pipeline Corporation (Intervenor)

Southern Natural Gas Company (Intervenor)

Southwest Gas Corporation (Petitioner)

State of Louisiana (Petitioner)

State of Indiana, Office of Utility Consumer Counselor (Petitioner)

Tenneco Gas, Inc. (Intervenor)

Tennessee Gas Pipeline Company (Intervenor)

Tennessee Small General Service and Columbia Small Customer Group (Intervenor)

Tennessee Valley Municipal Gas Association (Petitioner)

Texaco, Inc. (Intervenor)

Texas Eastern Transmission Corporation, *et al.* (Intervenor)

TransCanada Pipelines Limited (Intervenor)

Transcontinental Gas Pipe Line Corporation (Intervenor)

Transwestern Pipeline Company (Intervenor)

Trunkline Gas Company (Intervenor)

T.W. Phillips Gas & Oil Company (Intervenor)

UGI Utilities, Inc. (Intervenor)

Union Pacific Fuels, Inc. (Intervenor)

United Cities Gas Company (Intervenor)

United Distribution Companies (Petitioner)

Vastar Resources, Inc. and Vastar Gas Marketing, Inc. (Intervenor)

Virginia Electric & Power Company (Petitioner)

Washington Gas Light Company (Intervenor)

Williams Gas Marketing Company (Petitioner)

Williams Natural Gas Company (Petitioner)

Williston Basin Interstate Pipeline Company (Petitioner)

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The American Public Gas Association and Citizens Gas & Coke Utility [hereinafter collectively referred to as "Petitioners"] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. at 1a-147a)[1] is reported at *United Distribution Companies v. Federal Energy Regulatory Commission*, 88 F.3d 1105 (D.C. Cir. 1996) ("*UDC v. F.E.R.C.*"). The opinions of the Federal Energy Regulatory Commission ("FERC" or "Commission") reviewed by the court of appeals are reported at *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, "Order No. 636", F.E.R.C. Stats. & Regs. (CCH) ¶ 30,939 (Pet. App. at 175a-407a), *order on reh'g*, "Order No. 636-A", F.E.R.C. Stats. & Regs. (CCH) ¶ 30,950 (Pet. App. at 408a-812a), *order on reh'g*, "Order No. 636-B", 61 F.E.R.C. ¶ 61,272 (1992) (Pet. App. at 813a-998a), *reh'g denied*, 62 F.E.R.C. ¶ 61,007 (1993) (Pet. App. at 999a-1000a).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 16, 1996. Additionally, the court of appeals denied timely petitions for rehearing and timely suggestions for rehearing *en banc* on October 29, 1996 (Pet. App. at 1005a-06a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994) and 15 U.S.C. § 717r(b) (1994).

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1. An appendix containing the opinion of the court of appeals and its opinions on rehearing, as well as the several lengthy FERC orders that give rise to those opinions, is being filed jointly by the several petitioners for writ of certiorari of the court of appeals' decision.

STATUTORY PROVISIONS INVOLVED

Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1994) (Pet. App. at 1007a-08a), provides that:

> [t]he provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 1(c) of the Natural Gas Act, 15 U.S.C. § 717(c) (1994) (Pet. App. at 1008a), provides in pertinent part that:

> [t]he provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and services of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this

> chapter by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States.

Section 2 of the Natural Gas Act, 15 U.S.C. § 717a (1994) (Pet. App. at 1010a-11a), the definitional section of the Act, defines a "natural gas company" as a "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale"; defines a "person" as an "individual" or a "corporation"; and defines a "municipality" as a "city, county, or other political subdivision or agency of a State," but not an individual or corporation.

STATEMENT OF THE CASE

Petitioners, municipalities as defined in Section 2 of the Act ("municipalities"), seek review because the court of appeals' judgment permits FERC to exceed its authority by regulating the activities of Petitioners, which are expressly exempted from FERC's jurisdiction. The predicate of the argument is the statutory framework supplied by the Natural Gas Act ("NGA" or "Act"). 15 U.S.C. § 717 *et seq.* (1994).

A. The Procedural Course of the Agency Proceedings.

1. Order No. 636 and Capacity Release.

Over the last decade, the Commission has taken steps to "restructure" the natural gas industry. During that period, the Commission has allowed market forces to play a more dominant role. The orders on review, Order No. 636, *et seq.*, are the latest in a series of FERC orders intended to restructure the natural gas industry along more competitive lines. FERC claims that these initiatives "finalize" the structural changes it has approved

in recent years and "complete the evolution" to a more competitive market. Pet. App. at 176a-77a.

The principal innovation of Order No. 636 was FERC's directive to the pipelines to "unbundle" their sales and transportation functions. As a result, pipelines exited the gas sales business and became transporters only, and unregulated entities assumed the sales function. Most pertinent here, the Commission promulgated new regulations setting out the procedures under which firm shippers on interstate gas pipelines can temporarily release their transportation capacity to other shippers.[2] *See* Pet. App. at 243a-45a. The Commission did so through the exercise of its jurisdiction to regulate pipelines' terms and conditions of service and rates. Under these "capacity release" procedures, pipeline shippers can resell their firm gas transportation capacity rights.[3] Such resales, which must be made in a non-discriminatory fashion, can be made on a temporary or permanent basis, through either prearranged transactions or by "posting" an offer to release firm capacity on the pipeline's electronic bulletin board.[4] When firm capacity is posted for competitive bidding on the bulletin board, it is awarded to the entity making the best bid according to the criteria established by the firm shipper releasing the capacity.

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2. "Firm shippers" are pipeline customers who have paid for the right to have natural gas transported on their behalf by the interstate pipeline without interruption.

3. Generally speaking, "capacity" is an ownership right held by a shipper on an interstate pipeline that determines the amount of natural gas that the pipeline is obligated by contract to transport for the particular shipper.

4. The electronic bulletin board is nothing more than an informational posting center whereby firm shippers desirous of obtaining or selling capacity on an interstate pipeline can notify other pipeline customers of their intent.

2. Capacity Release Programs and Municipalities.

In Order No. 636-A, the Commission declared that municipalities must comply with the capacity release programs. In doing so, the Commission effectively abrogated its prior decisions holding that the Commission lacks NGA jurisdiction over municipalities. The Commission in Order No. 636-A "agree[d] with [Petitioners] that municipalities are beyond the jurisdiction of the Commission." Pet. App. at 474a-77a. Nonetheless, FERC required municipalities to comply with all of its pipeline capacity release procedures, and justified its regulation of municipalities in this respect solely on the ground that the pipelines' role in the capacity release mechanism is essential.[5] This limited analysis was FERC's sole effort to justify its assertion of jurisdiction over municipalities.

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5. Explaining its holding that municipalities are beyond the jurisdiction of the Commission, FERC stated:

> this means only that municipalities need not be certificated to transport gas on their own systems or to participate in jurisdictional capacity brokering or releasing mechanisms. However, this does not mean that municipalities are entitled to release capacity on an interstate pipeline without complying with the procedures pertinent to the pipeline's releasing mechanism. It means only that the municipalities need not be certificated to release capacity. The Commission's clarification in *Texas Eastern Transmission Corp.* [48 F.E.R.C. ¶ 61,248 (1989), *order on reh'g*, 51 F.E.R.C. ¶ 61,170 (1990)], that "all the conditions imposed upon program participants do not apply to municipalities" is not applicable where the conditions pertain to the mechanics of the release by and through the pipeline. In that circumstance, the capacity releasing mechanism is no different from any other pipeline term or condition of service with which the municipality must comply.

Pet. App. at 476a-77a (footnotes omitted).

Based on FERC's jurisdictional overreaching, Petitioners sought rehearing. In Order No. 636-B, the Commission reaffirmed its position:

> [W]hile municipalities are beyond the jurisdiction of the Commission, they may release capacity on a pipeline only by complying with the procedures pertinent to the pipeline's releasing mechanism because the conditions of the program pertain to the mechanics of the release by and through the pipeline.

Pet. App. at 858a-59a. This ended FERC's review of the capacity release issue as it affects municipalities.

Throughout the Order No. 636 series, the Commission claimed that it was not asserting NGA jurisdiction over municipalities by requiring them to comply with its mandated "mechanical" requirements in releasing their capacity. However, in declaring its authority to determine whether, at what price, and to which shippers municipalities may release their capacity, the Commission has effectively asserted jurisdiction over them. This *de facto* assertion of jurisdiction violates the NGA.

B. Statutory Bases for the Case.

1. Overview.

Congress established a comprehensive regulatory scheme for the natural gas industry in the NGA. Congress granted the Federal Power Commission ("FPC"), the predecessor of FERC, jurisdiction over the sales for resale of natural gas in interstate commerce, as well as the transportation of natural gas in interstate commerce.

There are approximately 1,000 municipalities that own and operate their natural gas distribution systems which, under the NGA, do not come under FERC's jurisdiction. The rates and services of municipalities are regulated by local boards, city councils, or sometimes state agencies. FERC's effective assertion of jurisdiction over municipalities pursuant to Order No. 636, which is contrary to the express language of Section 2 of the NGA, will improperly obstruct their business arrangements with third party end-users within their own service area. It is this aspect of the court's decision with which Petitioners take issue.

2. Municipalities, By Definition, Are Exempt From FERC's Jurisdiction.

Section 1(b) of the Act determines FERC's jurisdiction. Pet. App. at 1007a-08a. Congress empowered the Commission to regulate the transportation of natural gas in interstate commerce, the sale of natural gas in interstate commerce for resale, and natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 516 (1947). Congress' intent was clear. The Act did not reference any other type of natural gas sales and by necessary inference excluded direct sales for consumptive use and the transportation of natural gas on a local level. These are precisely the activities in which municipalities typically engage.

Under Section 2 of the NGA, Pet. App. at 1010a, which has remained unchanged since the Act was introduced in the 74th Congress in 1935,[6] Congress expressly exempted municipalities from the Commission's jurisdiction. The Commission's jurisdiction under the Act, *see* NGA Section 1(b), extends only to "natural gas companies," defined in Section 2(6) of the Act

6. The paragraph and section numbers at times did change with successive versions of the bill.

as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Section 2(1) of the Act defines a person to include "an individual or a corporation." And Section 2(2) defines a "corporation" to include "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined." Municipalities are defined in Section 2(3) of the Act as a "city, county, or other political subdivision or agency of a State."

Thus, because a "natural gas company" must be a "person," and a "person" can only be an "individual" or a "corporation," and a municipality is neither an "individual" nor a "corporation," Congress did not give to FERC the power to exercise jurisdiction over municipalities. Indeed, FERC has repeatedly recognized this fundamental fact. *See* discussion *infra.*

In light of FERC's exercise of jurisdiction over municipalities, Citizens and APGA, among others, filed with the United States Court of Appeals for the District of Columbia Circuit timely petitions for review of Order No. 636. Upon review, the court affirmed FERC's holding in Order No. 636 that FERC could regulate the capacity release transactions of municipalities.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' DECISION IGNORES THE PLAIN MEANING OF THE STATUTE AND CONFLICTS WITH DECADES OF COURT AND FERC PRECEDENT.

A. The NGA's Plain Meaning Must Be Enforced.

This is a case in which the court of appeals has ignored the plain meaning of the governing statute. Any interpretation of the NGA and the Commission's power to regulate the capacity release of municipalities must rest on a firm understanding of congressional purpose in enacting the NGA. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in judgment in part). This Court need not go beyond the language of the NGA to determine whether Congress intended the Commission to have jurisdiction over municipalities. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also Medtronic Inc. v. Lohr*, __ U.S. __, 116 S. Ct. 2240, 2250-51 (1996) (citation omitted). Congress' intent is clearly stated in Section 2 of the NGA. 15 U.S.C. § 717a.

Moreover, the legislative history of the NGA reveals Congress' express intention that the Act leave regulation of local distribution service exclusively at the local level. H.R. Rep. No. 709, 75th Cong., 1st Sess. (1937). ("[T]he whole purpose of this Bill is to bring under Federal regulation the pipelines and to leave to the State commissions control over distributing

companies and over their rates, *whether that gas moves in interstate commerce or not.*") (emphasis supplied).

The specific language of the NGA both grants regulatory jurisdiction to the Commission in certain instances with respect to the transportation of natural gas and provides limitations on that jurisdiction with respect to municipalities. The court of appeals' finding that the Commission has jurisdiction over a municipality's capacity release transactions "given the involvement of interstate gas pipelines" (Pet. App. at 84a) is unsupported by the text of the NGA or the legislative framework surrounding it. *See generally* H.R. Rep. No. 709, 75th Cong., 1st Sess. (1937). It is clear that Congress anticipated the "involvement of interstate gas pipelines" with the activities of municipalities. *Id.* Thus, if Congress had intended that municipalities be subject to the Commission's jurisdiction when their activities "involved interstate gas pipelines," it would have so stated.

Instead, Congress struck the balance between the appropriate realm of federal regulation and the appropriate realm of local regulation and reflected it in the express terms of the NGA. *See* 15 U.S.C. §§ 717(b) and 717a. FERC's attempt to gain jurisdiction over municipalities indirectly through its exercise of jurisdiction over a pipeline's transportation capacity has the effect of usurping the authority of non-jurisdictional municipalities.

The court of appeals, by its opinion, upset Congress' intended jurisdictional balance by improperly endorsing the Commission's regulation beyond the mandated federal sphere into "matters primarily of local concern." 15 U.S.C. § 717(c). Permitting such overreaching by a federal agency is prohibited under the principles of federalism. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

The Supreme Court should intervene in cases such as this, where the federal government's regulation upsets the federal-municipal balance to such a degree that it usurps the traditional authority of local governments and thus violates the principles of federalism. *Id.*; *see also United States v. Lopez*, __ U.S. __, 115 S. Ct. 1624, 1639-40 (1995) (Kennedy, J., concurring).

FERC itself does not quarrel with the fact that municipalities are exempt entities under Section 2 of the NGA: "FERC wholly 'agrees with [petitioners] that municipalities are beyond [its] jurisdiction.' " Pet. App. at 84a. Despite the Commission's concession, the court of appeals erroneously applied its own tortured statutory construction of the NGA in order to justify the Commission's jurisdiction. The court of appeals improperly read the broad language in Section 1(b) of the NGA stating that the Commission has jurisdiction over the "interstate transportation of natural gas" as bringing the municipality's capacity release transactions under the Commission's jurisdiction. Pet. App. at 83a. In so doing, the court of appeals effectively held that the *broad* jurisdictional statement in Section 1(b) overrides the very *specific* exclusion of municipalities from the Commission's jurisdiction in Section 2 of the NGA. *See* Pet. App. at 83a-84a. The court of appeals provided no meaningful explanation or analysis of this untenable construction of the NGA.

Under the holding in *UDC v. F.E.R.C.*, the Commission, through its jurisdiction over the terms and conditions of interstate pipelines' transportation services and the rates charged for these services, will now be able to dictate when municipalities can release their capacity to third party customers, which third party customers they can release to, and the appropriate price a municipality can charge for its products and services. The court of appeals' decision effectively expands FERC's statutory responsibilities and, in so doing, affords the Commission, in

direct conflict with the NGA, the ability to regulate municipalities.[7]

B. Conflict with Past Precedent.

In almost sixty years of NGA jurisprudence, the courts and FERC have carefully observed the statutorily-imposed constraint upon the scope of the Commission's interstate commerce jurisdiction. Notwithstanding the courts' *and* FERC's consistent refusal to expand FERC's jurisdiction over municipalities in the absence of an express act of Congress granting such authority, that is the result of Order No. 636 and of the court's holding in *UDC v. F.E.R.C. See generally F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 635-36 (1972) ("[A] need for [comprehensive] federal regulation does not establish FPC jurisdiction that Congress has not granted.").

The crux of the court of appeals' reasoning in *UDC v. F.E.R.C.* is its agreement with FERC that the agency's jurisdiction over the transportation of natural gas in interstate commerce extends to capacity release. The court held:

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7. This is especially important because FERC paradoxically is expanding its jurisdiction at the same time it is pursuing deregulation. Emboldened by the court of appeals' decision, FERC subsequently has attempted to assert jurisdiction over the transportation programs of local distribution companies ("LDCs") (which are also exempt from FERC jurisdiction) behind their city-gates, claiming that their activities are but an extension of the interstate market. *See Secondary Market Transactions on Interstate Natural Gas Pipelines, Proposed Experimental Pilot Program to Relax the Price Cap for Secondary Market Transactions*, 61 Fed. Reg. 41,401 (Aug. 8, 1996) ("LDCs need to meet the NOPR's requirements for open access service") (citing Secondary Market Transactions on Interstate Natural Gas Pipelines, Notice of Proposed Rulemaking, 61 Fed. Reg. 41,046, 41,053-54 (Aug. 7, 1996)).

> FERC's transportation jurisdiction extends as a separate matter over capacity release given the involvement of interstate gas pipelines. The pipelines' role in capacity release is absolutely central, and the transaction itself controls access to interstate transportation capacity . . . .

Pet. App. at 84a-85a (footnotes omitted). Finding "persuasive" this Court's holding in *F.P.C. v. Louisiana Power & Light Co.*, the court of appeals held that FERC's capacity release program is similar to its curtailment regulations[8] in that both involve the pipelines' allocation of transportation capacity among their shippers in compliance with federally mandated strictures. The court of appeals reasoned that because municipalities are subject to the curtailment regulations, they are also subject to FERC's capacity release regulations. Pet. App. at 85a-86a. Indeed, the court of appeals' reasoning is based on the court's analogy of pipeline curtailment plans to capacity release procedures. However, a far more accurate and compelling analogy is that of capacity release to capacity assignment.

Curtailment involves the allocation of a finite resource of interstate pipeline capacity sold in the primary market.[9] In sharp contrast, capacity release involves the ownership, sale, and transfer of pipeline capacity rights by a shipper (here a municipality) in the *secondary market.*[10] Once a municipality

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8. "Curtailment" occurs during periods when the supply of natural gas and/or pipeline capacity falls below contracted-for levels, and the pipelines must redistribute gas supply or capacity to its shippers.

9. The "primary market" is the market in which initial contract rights between the pipeline and the shipper are established.

10. The "secondary market" consists of the transfer of initial contract rights to other shippers.

purchases the pipeline capacity, its handling of its ownership, sale, and transfer rights in such capacity is subject to local regulation.

In contrast to curtailment, capacity release and capacity assignment both deal exclusively with secondary market transactions. In fact, before FERC developed its capacity release program under Order No. 636, FERC had approved "capacity assignment" programs which allowed shippers to assign their firm transportation rights. *Texas Eastern Transmission Corp.*, 51 F.E.R.C. ¶ 61,170 (1990); *Texas Gas Transmission Corp.*, 55 F.E.R.C. ¶ 61,208 (1991); *United Gas Pipe Line Co.*, 46 F.E.R.C. ¶ 61,060, *modified on other grounds*, 49 F.E.R.C. ¶ 61,166 (1989). Although these capacity programs were called "transportation assignment programs," they were the same in concept as the "capacity release" programs established in Order No. 636. For instance, the capacity assignment programs allowed shippers to assign, on any day, all or a portion of their firm transportation capacity rights, and to tender gas for transportation under the shipper's firm service agreement to third parties. *See generally id.*

In explaining its understanding of the transportation assignment program FERC has stated:

> Since the brokering, or assignment, of transportation capacity will control the access to that capacity, the Commission believes that brokering is tantamount to transportation. Therefore, brokering constitutes a new transportation service, subject to the Commission's jurisdiction, that is not covered directly by existing NGA section 7(c) transportation authorizations. The Commission is therefore herein granting

> certificate authorization to persons who are not interstate pipelines.

Texas Eastern Transmission Corp., 51 F.E.R.C. ¶ 61,170 at 61,873 (1990).

The Commission authorized willing persons who were not interstate pipelines to buy, sell, and resell their capacity under firm rate schedules. *Texas Eastern*, 48 F.E.R.C. ¶ 61,248 (1989). As can be seen, these previous capacity assignment programs bear a distinct similarity to the current capacity release program adopted by the Commission in Order No. 636.

A review of FERC's prior decisions regarding capacity assignment readily reveals that the court of appeals' interpretation of *F.P.C. v. Louisiana Power & Light Co.* is fatally flawed. Under *F.P.C. v. Louisiana Power & Light Co.*, the Commission can require a *jurisdictional interstate pipeline* to file a curtailment plan covering gas sold directly to end-users because the Commission has authority over the transportation of such gas. That is true despite the fact that the NGA withheld from the Commission rate-setting authority with respect to direct local sales of natural gas. However, in *Texas Eastern*, 51 F.E.R.C. ¶ 61,170, the Commission soundly rebuffed challenges to its exclusion of *municipalities* from compliance with its regulations with respect to capacity assignment. In doing so, it disposed of the very arguments it now seeks to utilize in Order No. 636 to unlawfully exert jurisdiction over municipalities. The Commission held:

> Anadarko and Process Gas contend that the Commission has jurisdiction over municipalities that assign capacity under the program. Their argument is threefold. First, they argue that the Commission's jurisdiction

> attaches independently to "the transportation of natural gas in interstate commerce." Therefore, the Commission has jurisdiction over any entity that transports gas in interstate commerce. Secondly, they argue that the Commission has the authority under NGA section 7 to condition Texas Eastern's certificate upon the requirement that municipalities comply with all terms and conditions required of other participants. Third, they argue that the Commission has the authority under section 16 of the NGA to require municipalities to obtain and comply with the limited jurisdictional certificates as a prerequisite to program participation.
>
> The August 22 order explains that a municipality is not subject to the Commission's jurisdiction under the NGA because a municipality is not a "person" and therefore cannot be "a natural gas company" under the NGA. 15 U.S.C. §§ 717 (b) and 717 (f). The sections of the NGA to which the intervenors refer apply to "persons." *Since municipalities are not, by definition, persons, the Commission is not persuaded that its interpretation of the NGA is in error.* Accordingly, the request for rehearing on the issue are denied.

Id. at 61,453-54 (emphasis supplied).

FERC went to great lengths in *Texas Eastern* to indicate that, even though the capacity assignment program involved transporting natural gas in interstate commerce, the

municipalities were exempt from conditions imposed upon other participants:

> The August 22 order clarifies that the limited jurisdiction certificates do not apply to municipalities. *The Philadelphia Gas Works requests clarification that all the conditions imposed upon program participants do not apply to municipalities. Since municipalities are beyond the jurisdiction of this Commission, the Philadelphia Gas Works is correct.* The Commission is therefore granting this clarification.

Id. at 61,454 (emphasis supplied).

The court of appeals' ruling permits the Commission to reverse improperly its previous holding, which rejected the notion that municipalities were required to comply with the provisions governing other participants in the capacity assignment program. *Michigan Consolidated Gas Co. v. F.E.R.C.*, 883 F.2d 117, 122 (D.C. Cir. 1989) ("[A]n agency may not casually ignore its own past decisions . . . [but] must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed. . . .") (citations omitted). The court of appeals was obligated to set aside any Commission action that constituted an arbitrary and capricious departure from pre-existing Commission policy without an adequate explanation. *Panhandle Eastern Pipe Line Co. v. F.E.R.C.*, 890 F.2d 435, 439 n.12 (D.C. Cir. 1989). It failed to do so.

Nor is this an isolated FERC decision. In *Panhandle Eastern Pipe Line Co. v. City of Rolla*, 26 F.P.C. 736 (1961), a seminal case that is directly at odds with the court of appeals' holding in *UDC v. F.E.R.C.*, the Commission considered the question of

whether the City of Rolla, a municipality and the co-owner with an interstate pipeline of gas produced and sold in interstate commerce, was a "natural gas company" subject to FERC's NGA jurisdiction. The pipeline disputed the price it was contractually obligated to pay the City of Rolla and sought relief from the Federal Power Commission, FERC's predecessor agency, because sales of gas were then price-regulated under the NGA. The Commission held:

> the plain language of the Act, found in Section 2, subsections (1), (2), (3) and (6) expressly excludes municipalities from the ambit of Commission jurisdiction.
>
> * * *
>
> From this it is clear that municipalities cannot be "natural-gas companies" as that term is used by the Act. We are not, therefore, vested with jurisdiction to regulate municipalities, *even though they are engaged in the sale of natural gas to interstate pipeline companies.* Lacking such jurisdiction, it follows that we are without jurisdiction to resolve disputes between Panhandle and Rolla relating to the contractual price for the sales of gas produced from their jointly owned acreage.

Id. at 737-38 (emphasis supplied).

Similarly, in a 1994 *Tennessee Gas Pipeline Company proceeding*, 69 F.E.R.C. ¶ 61,239 (1994), *on reh'g*, 70 F.E.R.C. ¶ 61,329 (1995), FERC considered whether it could lawfully assert jurisdiction over certain activities of the City of Decatur, Alabama, a municipality as defined in Section 2 of the NGA. In

that case, Decatur had planned to construct substantial pipeline facilities to interconnect with facilities to be constructed by an interstate pipeline. An entity opposing the construction urged the Commission to exercise jurisdiction over the City's proposed facilities, asserting that, under the NGA, the Commission's jurisdiction "attaches independently to . . . the transportation of natural gas in interstate commerce" and that because of the Commission's separate "*transportation*" jurisdiction, FERC must regulate the City's facilities. 69 F.E.R.C. ¶ 61,239 at 61,906-07. FERC flatly rejected this argument. *Id.* at 61,906.

II.

THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT FERC MANIPULATED ITS CAPACITY RELEASE REGULATIONS FOR THE PURPOSE OF CREATING AN IMPROPER JURISDICTIONAL TOEHOLD OVER NON-JURISDICTIONAL MUNICIPALITIES.

The court of appeals recognized that its decision would have been entirely different had it believed that FERC "merely manipulated its regulations" to involve the pipelines in a minimal way in the capacity release program for the purpose of creating a jurisdictional toehold over a nonjurisdictional entity. Pet. App. at 85a, n. 67. Yet, that is precisely what FERC did.

FERC concedes that the pipelines' primary function in these capacity release transactions is that of a "public clearinghouse." Pet. App. at 479a. For example, under the new capacity release programs, the pipeline's primary function is to maintain an electronic bulletin board for shippers desiring to release capacity on which they can post their offers and await other shippers' bids on those offers. Pipelines have no meaningful ability to reject one shipper's offer to release or obtain capacity from another shipper. Accordingly, the new capacity release programs

do not involve the pipelines in any meaningful manner, and they certainly do not have a "central" role such that FERC's jurisdiction would attach.

As noted,[11] despite its similarity to the capacity release program, FERC recognized that municipalities were not subject to the capacity assignment program. The previous capacity assignment program required assignors to notify the pipelines in writing of any assignment of capacity. *Texas Gas Transmission Corp.*, 55 F.E.R.C. ¶ 61,208 (1991). Order No. 636 only minimally changed the requirements to assign, or release, capacity, so as to continue to involve the pipeline in a purely ministerial manner. FERC and the court of appeals interpreted this change as something more, and used this "hook" to expand FERC's jurisdiction to include municipalities. FERC's assertion in Order No. 636-A, that its previous statements of "non-jurisdiction" regarding the mechanics of the capacity release mechanism were not applicable, smacks of jurisdictional overreaching. FERC now suggests that even though the previous transportation assignment program required specific notification to the pipelines of a shipper's actions regarding assigned capacity, the new capacity release regulations include the pipelines in more of the mechanics of the release.[12] This, FERC concludes, allows it to assert jurisdiction over municipalities.

However, absent an act of Congress, FERC cannot assume jurisdiction over municipalities. Given the similarity of the capacity assignment and capacity release programs, the only conclusion one can draw fairly from Order No. 636 is that the agency has manipulated its regulations to create a jurisdictional toehold over non-jurisdictional municipalities.

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11. *See* discussion *supra* at 13-15.

12. Importantly, FERC never explains what it meant by the pipelines' participation in the "mechanics" of the release.

CONCLUSION

For the reasons set forth above, the court of appeals erred in permitting the Commission's unconstitutional assertion of jurisdiction over municipalities, and the petition for a writ of certiorari should be granted.

Respectfully submitted,

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